FILE COPY. 891

Office Supreme Court U.
FILED
OCT 7 1903
JAMES H. McKENNEY,
Clerk

No. 83. October Term, 1903.

Supreme Court of the United States.

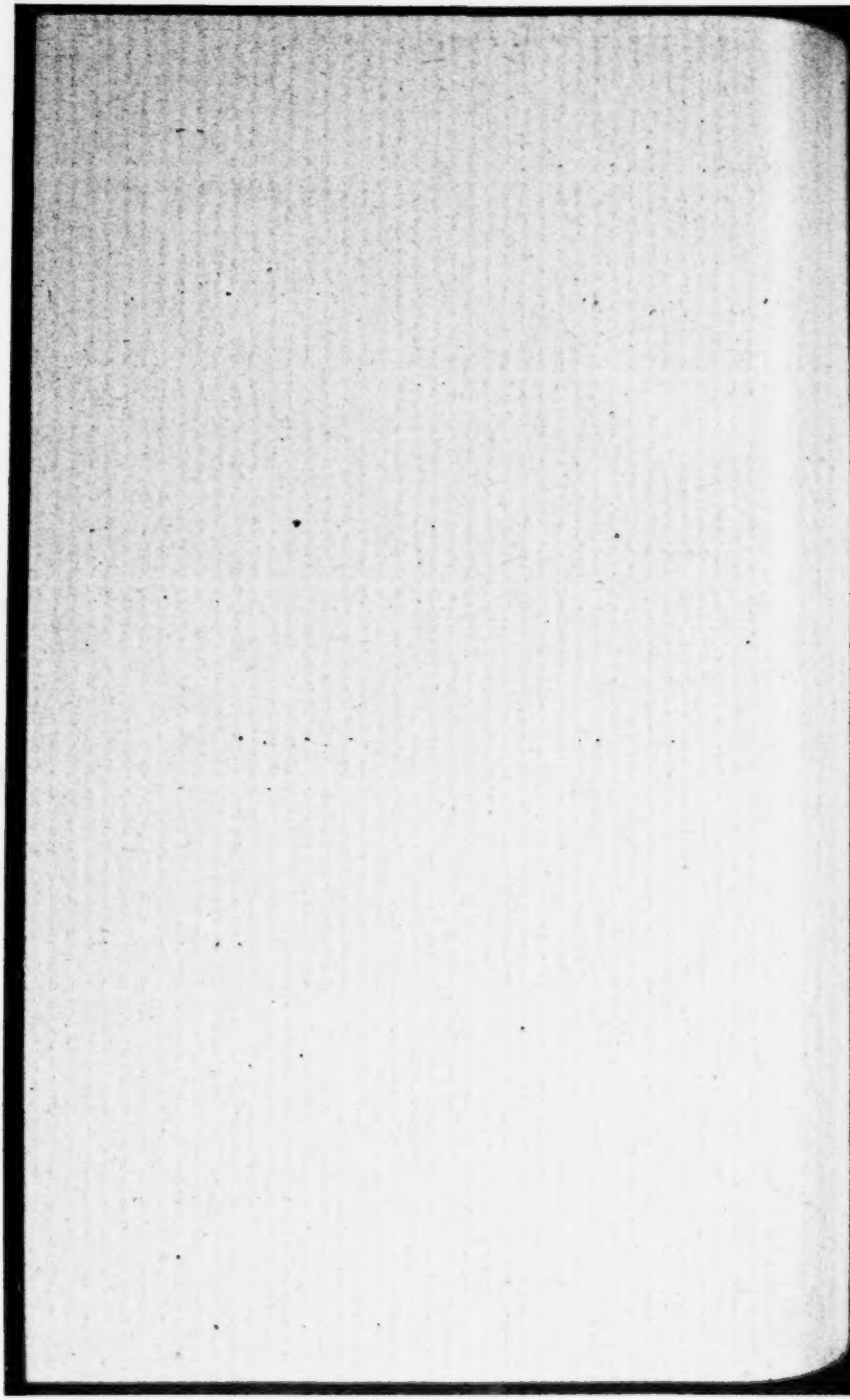
W. H. Spencer, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Plaintiff in Error,

vs.

Duplan Silk Company, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR *SUR* MOTION TO DISMISS WRIT OF ERROR.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

W. H. Spencer, Trustee in Bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Plaintiff in Error,

vs.

Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, Defendant in Error.

October Term, 1903.

No. 83.

MOTION TO DISMISS WRIT OF ERROR.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF SAID COURT:

And now comes the defendant in error and moves the court to dismiss the writ of error herein for the following reasons, to wit:—

That this court is without jurisdiction to entertain this writ of error because the only ground upon which the Circuit Court originally had jurisdiction was diversity of citizenship between the parties.

The action was begun by the plaintiff in error in the Court of Common Pleas for the County of Lehigh and State of Pennsylvania, on October 18th, 1900, by the issue a writ of summons in trespass, followed by the filing of a dedication in trover, charging the defendant with the conversion of certain lumber. No Federal question was disclosed in the record as it stood in the State court.

Thereafter, to wit, on November 19th, 1900, the Duplan Silk Company, defendant in error, presented its peti-

tion to the said Court of Common Pleas of Lehigh County for the removal of the record of said cause to the Circuit Court of the United States for the Eastern District of Pennsylvania, alleging as ground for said removal that the controversy in this suit is wholly between citizens of different States. A copy of said petition is found at page 10 of the transcript of the record of this cause in your Honorable Court.

Upon consideration of said petition and the filing of a bond as required by the laws of the United States, the said Court of Common Pleas of Lehigh County ordered and decreed that the record in this suit be removed to the Circuit Court of the United States for the Eastern District of Pennsylvania.

On March 19th, 1901, the defendant in error filed in the Circuit Court of the United States for the Eastern District of Pennsylvania an exemplification of the record of said suit as the same existed in said Court of Common Pleas of Lehigh County, and thereafter, on April 23d, 1901, filed a plea of "Not guilty" to the declaration theretofore filed in said cause.

On November 11th, 1901, a jury was called to determine the issue joined as aforesaid, and on November 11th, 1901, the jury found for the plaintiff, and assessed the damages at $12,183. Before said jury, the contention of the plaintiff in error was that said lumber and building materials were his property as trustee in bankruptcy of James V. Bennett and Samuel W. Rothrock, whereas the defendant in error contended that said lumber and building materials were its property by virture of the provisions of a certain contract between the defendant in error and said Bennett and Rothrock.

On January 15th, 1902, a motion by the defendant for judgment *non obstante veredicto* was overruled, and judgment was entered upon the verdict in favor of the plaintiff, and on January, 24th, 1902, the defendant in error filed in said Circuit Court of the United States its petition for writ of error, which writ was duly allowed and was thereafter duly prosecuted in the United States Circuit

Court of Appeals for the Third Circuit, which court on May 7th, 1902, entered a judgment in said case reversing the judgment of the said United States Circuit Court in and for the Eastern District of Pennsylvania, and remanding the cause, with instructions to enter judgment for the defendant upon the verdict.

Defendant in error is advised, verily believes, and so avers, that said judgment of the United States Circuit Court of Appeals is a final judgment from which the plaintiff in error is not entitled to a writ of error from your Honorable Court, for the reason that the jurisdiction of the Circuit Court of the United States in and for the Eastern District of Pennsylvania attached in this cause solely and exclusively by reason of the diversity of citizenship between the parties hereto, and not by reason of the existence of any of the questions enumerated in section 5 of the Act of Congress approved March 3d, 1891, as questions upon which a writ of error may be had from your Honorable Court.

WM. JAY TURNER,
RICHARD C. DALE,
Attorneys for Duplan Silk Company, Defendants in Error.

CITY AND COUNTY OF NEW YORK, *ss.*

Henry Schnakenberg, being duly sworn according to law, deposes and says that he is the treasurer of the Duplan Silk Company, the defendant in error in the above-entitled case, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

H. SCHNAKENBERG.

Sworn to and subscribed before me, this nineteenth day of September, A. D. 1903.

W. D. DESPARD,
Notary Public No. 28.

[SEAL]

(Certificate of county clerk attached.)

BRIEF OF ARGUMENT *SUR* MOTION TO DISMISS WRIT OF ERROR.

The defendant in error asks for the dismissal of the writ of error in this case by virtue of the provisions of sections 5 and 6 of the Act of Congress approved March 3d, 1891, which sections are as follows:—

"SEC. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:—

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

"Nothing in this Act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

"SEC. 6. That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law.

"And the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties

to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

"Excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought for review by writ of error or appeal.

"And excepting also, that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This action was commenced by the present plaintiff in error in a court of the Commonwealth of Pennsylvania, in which court he filed a declaration averring in substance that on January 13th, 1900, certain lumber and building materials were the property of the firm of Bennett & Rothrock, and that by virtue of an adjudication of bankruptcy on that date, he succeeded to the title of said firm in said materials, and that on January 15th, 1900, the present defendant in error wrongfully and injuriously converted said lumber and building materials to its own use. This declaration sets forth no matter raising any controversy under the Constitution, laws, or treaties of the United States. If on January 13th, 1900, the lumber and building materials in question belonged to the firm

of Bennett & Rothrock, the plaintiff in error necessarily succeeded to the title of that firm by virtue of the adjudication of bankruptcy.

Before the time had arrived for the defendant in error to plead to this declaration, the case was removed from the State court to the Circuit Court of the United States upon a petition by the present defendant in error, alleging that the controversy between the parties was wholly between citizens of different States. After the removal of the case, the defendant in error joined issue with the plaintiff in error upón the question of trover and conversion.

Whatever legal questions may have been incidentally involved in the issue of fact thus joined, there was certainly at the time of removal no ground for the Federal courts to take cognizance of the case except that the parties thereto were citizens of different States.

A verdict and judgment having been rendered against the defendant in error in the Circuit Court of the United States, a writ of error was obtained by the defendant in error and duly proceeded with under section 6 of the Act of Congress approved March 3d, 1891, in the Circuit Court of Appeals. In accordance with this Act of Congress, there was no other appellate court to which the defendant in error could apply for the correction of any errors that may have been committed by the Circuit Court. At that stage of the proceedings, as at the commencement of the action, the record indicated no controversy between the parties involving either—

First.—The jurisdiction of the Circuit Court.

Second.—A final sentence and decree in a prize cause.

Third.—A conviction of a capital or otherwise infamous crime.

Fourth.—The construction or application of the Constitution of the United States.

Fifth.—The constitutionality of any law of the United States or the validity or construction of any treaty made under its authority.

Sixth.—The contravention of the Constitution of the United States by the Constitution or laws of a State.

Consequently, under the provisions of the Act of Congress above mentioned, no writ of error could be prosecuted before this court.

The Circuit Court of Appeals having reversed the judgment of the Circuit Court, the present plaintiff in error seeks to have this court, upon writ of error, review this action of the Circuit Court of Appeals in so doing. The present writ of error must therefore be prosecuted under section 6 of the Act of March 3d, 1891, for the reason that the record discloses no controversy between the parties such as under section 5 of that Act would have permitted an appeal directly from the Circuit Court to this court. But section 6 of that Act expressly provides that the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States.

This court has on numerous occasions since the creation of Circuit Court of Appeals by the Act of March 3d, 1891, dismissed writs of error or appeals in equity where, as in this case, the courts of the United States were resorted to solely by reason of the diversity of citizenship of the parties litigant.

The leading case upon the question of practice herein involved is Colorado Central Consolidated Mining Company *vs.* Turck, 150 U. S., 138, in which a complaint was filed in a Circuit Court of the United States averring, as ground for the exercise of the Federal jurisdiction, that the plaintiff and defendant were citizens of different States. After a verdict and judgment in the Circuit Court, the case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was affirmed. After a petition for rehearing had been denied by the Circuit Court of Appeals, a writ of error was allowed to the Supreme Court. The case being submitted on motion to dismiss or affirm, this court, speaking by Mr. Chief Justice Fuller, dismissed the writ of error upon the grounds—

First.—That this court exercises appellate jurisdiction only in accordance with the Acts of Congress upon that subject.

Second.—That by the Judiciary Act of March 3d, 1891, judgments or decrees of the Circuit Courts of Appeals are final in all cases in which the jurisdiction is dependent entirely upon the diverse citizenship of the parties.

Third.—That this court, in the exercise of its appellate power, denies the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called to act.

Fourth.—That in a case where the jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, the inquiry into its jurisdiction is limited to that time; and the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which suggests a Federal question.

This decision was rendered on November 6th, 1893, and was followed on January 21st, 1895, by the decision in the case of Rouse, Receiver, *vs.* Letcher, 156 U. S., 47, where it was held that in order to maintain that a decision by a Circuit Court of Appeals was not final it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States, and that this rule was in nowise affected by the fact that after the Circuit Court had acquired jurisdiction by reason of the diverse citizenship of the parties, a third party was permitted to intervene, but the jurisdiction of the Circuit Court over such intervening controversy is to be ascribed to the same grounds as jurisdiction in the main suit.

In the case of Borgmeyer, Adr., *vs.* Idler, 159 U. S., 408, the jurisdiction of the Circuit Court was invoked by the issue of a summons, followed by the filing of a statement of claim or declaration, from which it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and from which it did not appear that jurisdiction was rested or

could be asserted on any other ground. As in the case at bar, a verdict was rendered for the plaintiff in the Circuit Court, and subsequently a motion for judgment *non obstante veredicto* was overruled. The defendant thereupon took the case on error to the Circuit Court of Appeals, which reversed the judgment of the Circuit Court and entered judgment for the defendant, notwithstanding the verdict on the points of law reservd at the trial. A writ of error to this court having been allowed, the cause came on on a motion to dismiss or affirm, when this court, again speaking by Mr. Chief Justice Fuller, and quoting largely from his opinion in the case of Colorado Central Consolidated Mining Company *vs.* Turck, *supra*, dismissed the writ of error. The court, speaking by Mr. Chief Justice Fuller, said:—

"In Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138, we held that when the original jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. It was there said:—

" 'By the Judiciary Act of March 3d, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing Circuit Courts, shall be had in this court, or in the Circuit Court of Appeals thereby established, according to the provisions of the Act regulating the same. The writ of error in this case was brought under section 6 of that statute, which provides that "judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or contro-

versy being aliens and citizens of the United States or citizens of different States," and also that "in all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000 besides costs. 26 Stat. at L., 826, 828, section 6, chapter 517. If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States."'

"Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the Circuit Court was invoked by the issue of summons of September 15th, 1892, followed by the filing of the statement of claim or declaration September 22d, 1892, and therefrom it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground.

"By the fifth section of the Act of March 3d, 1891, appeals or writs of error from the District and Circuit Courts of the United States to this court were allowed, among other cases, 'in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question,' but it was not suggested in the summons and statement of claim, that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the Circuit Court or the Circuit Court of Appeals. It is unreasonable to contend that any question was raised directly touching the validity or construction of either of the treaties of Venezuela by plaintiff's statement of claim or by clear and nec-

essary intendment therefrom, and, under the rule laid down in Turck's case, this writ of error must be dismissed. The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the Circuit Court, the writ of error could not have been entertained."

In the case of Carey *vs.* Railway Company, 161 U. S., 115, the rule above stated as to the finality of judgments or decrees entered in the Circuit Courts of Appeals in cases brought into Circuit Courts of the United States solely by reason of the diverse citizenship of the opposite parties, was held to extend to a case where the Circuit Court had jurisdiction of a foreclosure suit only upon the ground of diverse citizenship and subsequently a suit was brought to vacate the decree therein for collusion and fraud. It was held that the suit to vacate the decree was an ancillary suit and a continuation of the main suit, and therefore the jurisdiction of the Circuit Court over the proceeding to vacate the decree rested on the jurisdiction over the main suit, and depended entirely upon diverse citizenship, and the decree of the Circuit Court of Appeals in the ancillary suit was final under the Act of March 3d, 1891, section 6, and an appeal therefrom could not be taken to this court.

In the case of Press Publishing Company *vs.* Monroe, 164 U. S., 105, the complaint in the Circuit Court showed that the parties were citizens of different States and did not claim under or even mention the Constitution or laws of the United States. At the trial the plaintiff relied wholly upon a common-law right, although the defendant invoked the Constitution and laws of the United States. Nevertheless the judgment of the Circuit Court of Appeals was held to be final, and the writ of error was dismissed for want of jurisdiction. The Court, speaking by Mr. Justice Gray, concisely stated the law governing appeals in cases of which the Federal Courts take cognizance, as follows:—

"Of suits of a civil nature, at law or in equity, the Circuit Courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of a State and aliens; and by reason of the cause of action, in cases arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,' including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13th, 1888, chapter 866, 1 (25 Stat. at L., 433); Rev. Stat., 629, Clause 9. In order to give the Circuit Court jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138; Tennessee *vs.* Union & P. Bank, 152 U. S., 454; Oregon S. L. & U. N. R. Co. *vs.* Skottwe, 162 U. S., 490; Hanford *vs.* Davies, 163 U. S., 273.

"From final judgments of the Circuit Court in civil suits, an appeal or writ of error lies to this court, or to the Circuit Court of Appeals. It lies directly to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the Circuit Court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the Constitution or a law of a State is claimed to be in contravention of the Constitution of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case: Act of March 3d, 1891, chapter 517, section 5 (26 Stat. at L., 827, 828); Horner *vs.* United States, 143 U. S., 570; Chappell *vs.* United States, 160 U. S., 499.

"From final judgments of the Circuit Court in all other civil suits an appeal or writ of error lies to the Circuit Court of Appeals and the judgments rendered thereon by

the Circuit Court of Appeals are final (unless this court, by writ of *certiorari* or otherwise, orders the whole case to be brought up for its decision), in all cases in which the jurisdiction of the Circuit Court 'is dependent entirely upon the parties being aliens and citizens of the United Sates, or citizens of different States'; as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States), if the matter in controversy exceeds $1000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3d, 1891, chapter 517, section 6.

"This plaintiff in error, having been defeated in the Circuit Court, did not bring the case directly to this court as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in section 5 of the Act of 1891. But it took the case, under section 6, to the Circuit Court of Appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the Circuit Court of Appeals.

"The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different States, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different States.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2000, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United

States, or in any way mention or refer to that Constitution or to those laws; and at the trial she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing consideration, and as was expressly adjudged in Colorado Cent. Consol. Min. Co. *vs.* Turck, 150 U. S., 138 (37; 1030), is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction."

In the case of *ex parte* Jones, 164 U. S., 691, a petition was presented to this court for a writ of mandamus to the Circuit Court of Appeals for the First Circuit to allow an appeal to this court from a decree of that court affirming, or a decree of the Circuit Court for the District of Massachusetts dismissing, a suit brought by Charles F. Jones against the Merchants' National Bank of Boston. The original bill averred the complainant to be a citizen of Pennsylvania, and the defendant to be a National bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. The petition for *mandamus* was denied for the reason that section 4 of the Act of Congress, approved August 13th, 1888, denies to National banks the privilege of suing or being sued in the Circuit and District Courts of the United States, except in cases where diversity of citizenship would authorize an action to be brought, and that consequently, the proceeding instituted by Jones was entitled to the cognizance of the Federal Courts, solely by reason of the diverse citizenship of the parties, and therefore in accordance with the decision in Colorado Central Consolidated Mining Company *vs.* Turck, *supra*; and Borgmeyer

vs. Idler, *supra*, the decree of the Circuit Court of Appeals must be held to be one from which an appeal would not lie to the Supreme Court.

On February 24th, 1902, the case of Hugely Manufacturing Company *vs.* Galeton Cotton Mills, 184 U. S., 290, was decided by this court on motion to dismiss appeal. The proceeding was one to foreclose a corporation mortgage, and was originally brought in a Circuit Court of the United States by a citizen of Alabama against certain citizens of Georgia. After a decision by the Circuit Court, an appeal was taken to the Circuit Court of Appeals and from the decree of that court an appeal was allowed to this court. Pending this appeal this court granted a *certiorari sur* diminution of record, and in consequence thereof the omissions in the record were supplied. The court was unable to find in the record any ground on which the appeal could be sustained. Mr. Chief Justice Fuller, after citing the Act of March 3d, 1891, and referring to several decisions including that of Colorado Central Consolidated Mining Company *vs.* Turck, *supra*, said:—

"The general intention of the Act was to distribute the appellate jurisdiction, and to permit an appeal to only one court.

"Robinson *vs.* Caldwell, 165 U. S., 359.

"In this case appellants did not attempt to take an appeal directly to this court from the Circuit Court, nor could they have done so since no question was so raised as to bring the case within either of the classes named in section 5. Cornell *vs.* Green, 163 U. S., 75. The ground on which the jurisdiction of the Circuit Court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the Circuit Court of Appeals cannot be regarded otherwise than as made final by the statute.

"The question before us is, Whether this appeal was properly granted and can be maintained. In all cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute an appeal does not

lie, but any such case may be brought here 'by *certiorari* or otherwise.' The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be *ejusdem generis* with *certiorari*. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.

"The record filed in this case, June 25th, 1900, was entirely insufficient, and appellants applied for *certiorari* to perfect it by bringing up the alleged lacking portions. We granted that application, and the omissions were supplied. This auxiliary writ did not operate to bring the case before us or in itself to add any support to the appeal, which must stand or fall according as the statute did or did not allow it to be taken. Many matters are urged, such as alleged lack of indispensable parties below, and so on, as reasons why an appeal ought to lie, but our jurisdiction depends on the statute and cannot be enlarged by the supposed hardship of particular cases."

The right of the defendant in error to have the present writ of error dismissed plainly appears from a consideration of the consequences of a failure upon its part to remove the case from the State court to the United States court. Had the present defendant in error pleaded to the declaration of the plaintiff in error in the Court of Common Pleas of Lehigh County, State of Pennsylvania, the issue thereby raised would have been precisely the same as that which was determined by the jury in the Circuit Court of the United States for the Eastern District of Pennsylvania. Assuming that the jury in the State court had found, as did the jury in the Federal court, that the present defendant in error was guilty of trover and conversion, and that judgment had been entered upon such a verdict in favor of the present plaintiff in error, the case would then have gone to the Supreme Court of Pennsylvania, which is the highest court of that State. That court, like the Circuit Court of Appeals, would have reviewed the pleadings and the evidence in the case and have entered such judgment as it deemed proper under the circumstances. It is submitted,

however, that whatever judgment the Supreme Court of Pennsylvania might have entered, no ground would have existed for the removal of the record from that court by writ of error to this court.

Had the Supreme Court of Pennsylvania rendered a judgment in favor of the present plaintiff in error there could surely have been no ground upon which the defendant in error could have had such judgment reviewed by this court, for the reason that such a judgment would not have drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, or the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; nor would the record have disclosed any title, right, privilege, or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, specially set up or claimed by either party. It is upon these grounds alone that a judgment or decree of the highest court of a State may be brought before this court for review.

Revised Statutes of the United States, Section 709.

Had the Supreme Court of Pennsylvania, like the Circuit Court of Appeals, rendered a judgment in favor of the present defendant in error, the same answer would have been given to an attempt by the plaintiff in error to have such judgment reviewed by this court.

It is true that the rights of the plaintiff in error are in some respects based upon the Act of Congress relating to bankruptcy, approved July 1st, 1898, but as any decision which the highest court of Pennsylvania might have rendered in this case could by no possibility deny the validity of that Act of Congress or deny any right claimed under it, there certainly could not have been present in the record a Federal question upon which either party would have been entitled to a writ of error to review the action of that court.

Missouri Pacific Railroad Company *vs.* Fitzgerald, 160 U. S., 556.

The only connection which the Act of Congress relating to bankruptcy has to this case, in whatever forum it had been brought to final judgment, is in the matter of its application to the facts herein developed. As above stated, if the lumber and materials alleged to have been converted were, on January 13th, 1900, the property of the firm of Bennett & Rothrock, then by virtue of the provisions of said Act, the plaintiff in error succeeded to the title of the firm of Bennett & Rothrock to this lumber and building material. It will therefore be readily seen that the validity of the Bankruptcy Act was in no wise questioned, and the case falls within the rule laid down in Cameron vs. United States, 146 U. S., 533, that this court will not review a judgment of the highest court of a State in a case where no question is raised as to the validity of a statute of the United States, but merely the application of the statute to the facts of the case is involved.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.